

HEALTH LAW

Rights Disappear When US Policy Engages Children as Weapons of Deterrence

Craig B. Mousin, JD, MDiv

Abstract

In 1989, the United Nations adopted the Convention on the Rights of the Child (CRC), which the United States provided significant guidance in drafting. The CRC focused on those under 18 years of age, recognizing the rights most other international conventions and declarations accorded to adults. This article explores the ethical and health implications of the United States' failure to ratify the CRC with an emphasis on refugees. Federal policies have led to separation of families, mass detention of children and families, and accelerated removal, revealing the United States' disregard for global concern about children and families. By failing to ratify the CRC, the United States not only abdicates moral leadership, but also invites other nations to emulate its lack of care for children.

Origins of the Convention on the Rights of the Child

At its core, international human rights law upholds human dignity as a universal right inalienable through the laws or policies of specific nation states. After the tragedies of the Holocaust, nation states formalized this protection through the 1948 Universal Declaration of Human Rights¹ and other international treaties, including the 1951 Convention Relating to the Status of Refugees,^{2,3} which mostly define adult rights. Almost 40 years later, the global community recognized that it had failed to fully protect one significant segment of the world's population: children. In 1989, most nations adopted the Convention on the Rights of the Child (CRC), which focused on enabling those under 18 years of age to flourish as human beings.⁴ One commentator praised the CRC as "the first significant steps toward creating a world in which any child—even the most vulnerable separated immigrant child—can be aided to reach his or her full potential."⁵ The United States provided significant guidance in the drafting of the CRC, so much so that some called it the "US child rights treaty."⁶ Although the CRC has reached almost universal accord, only one United Nations member nation has failed to ratify it: the United States.^{7,8}

The United States' refusal to ratify the CRC has ethical consequences for children, families, and all who participate in detention and deportation mechanisms. Ratification would have demonstrated the United States' intent to adhere to the language of the CRC

and hold itself accountable. It would also have enabled the United States to exercise international leadership in protecting the best interests of the child under the CRC in a world with more than 10 million refugee children.⁹ By failing to ratify the CRC, the United States not only abdicates moral leadership, but also invites other nations to emulate its lack of care for children. Most pernicious, US policies employ children as weapons of deterrence on the theory that if we treat children poorly, parents fleeing persecution will not seek safe haven at our borders. Based on a purported border crisis, federal policies have led to separation of families, mass detention of children and families, and accelerated removal, broadcasting worldwide the United States' disregard of the child and family rights under the CRC. Although failure to ratify the CRC precludes the United States from CRC liability, the nation also falls short of protecting children under US refugee law. This article explores the ethical and health implications of the United States' failure to ratify the CRC with an emphasis on refugee issues.

International Law and the US Refugee Act of 1980

After acknowledging domestic immigration laws' shortcomings in protecting those fleeing the Nazis, the international community in 1951 adopted the Convention Relating to the Status of Refugees (also known as the Refugee Convention), which holds that persecuted persons or those fearing persecution should be permitted to request asylum at another nation's borders without fear of immediate return to danger.² Although US law establishes a civil violation or a potential misdemeanor for failing to enter at designated ports of entry,¹⁰ those fleeing persecution rarely can make plans or simply arrive at a port of entry with the necessary papers. Thus, while a nation's border defense constitutes one element of national sovereignty by designating proper documentation for entry and a proper place for inspection and admission, nations established additional procedures to determine bona fide asylum applicants. The US Refugee Act of 1980, which accepted most of the principles of the Refugee Convention, provides that anyone who arrives "whether or not at a designated port of entry ... irrespective of" their status may apply for asylum.¹¹ Prior to 2018, federal practice prescribed that when persons requested asylum, authorities permitted examination of their asylum claims and did not refer cases for criminal prosecution.

In April 2018, then Attorney General Jeff Sessions reversed that policy by referring asylum seekers to criminal prosecution before initiating asylum procedures, which resulted in the separation of children from family members.¹² Sessions' "zero-tolerance" policy also led many parents to waive important procedural protections in both criminal and asylum proceedings with the hope of facilitating family reunions.¹³ Although the administration halted family separations in June, over 100 children remained separated from their parents in October 2018—several months after the court deadline passed for the government to reunite families separated at the border.¹⁴

In addition, Sessions issued an administrative decision overruling earlier cases that had enabled those fleeing certain types of domestic violence or gang recruitment to obtain asylum.¹⁵ As a result, many approaching a designated point of entry are turned away, as the holding allegedly invalidates their asylum claim.¹⁶ Although litigation will challenge these developments,¹⁷ the length of litigation could make conditions so intolerable that many might withdraw their asylum request prior to adjudication of their fundamental rights. Those turned away at the border face increased vulnerabilities to criminal exploitation and violence.¹⁸

US Refugee Policies in Light of the CRC

The new policies stand in stark contrast to the purpose of the CRC: to ensure the “special care and assistance” owed to children, necessitate “appropriate legal protection,” and recognize the fundamental role of the family.⁴ With regard to refugees, the CRC emphasizes the best interests of the child; ensures that any care conform to standards and competent supervision; prohibits involuntary separation from parents without judicial review and in accordance with law, and only if “such separation is necessary for the best interests of the child.”⁴ When seeking refugee status, children should receive “appropriate protection and human assistance,” enjoy their rights under the CRC and other human rights instruments, and have access to legal representation and [appropriate health care](#).⁴ The CRC prohibits deprivation of liberty unlawfully or arbitrarily, emphasizing detention shall only be a last resort and for the shortest time possible.⁴

US policies wither in light of the CRC. Separation, detention, and deportation are a first resort instead of a last resort. Children have become a weapon of enforcement and deterrence. Further US policies take aim at the CRC’s very core, raising significant ethical issues on a number of fronts.

Criminalization of bona fide refugees. The US government grounds its policies on protecting the border against individuals entering “illegally,” a term the media seems to repeat and the body politic seems to adopt without question. By implication, children who cross the border do so illegally prior to any formal adjudication, notwithstanding the CRC’s call for appropriate legal protection for children. No rationale warrants the appellation *illegal* prior to a hearing and conviction. US refugee law supports the right of bona fide refugees to seek entry anywhere, regardless of status,¹⁹ and applicants are permitted to seek asylum prior to any criminal prosecution. If charged with a criminal violation, they have a constitutional right to a hearing and legal representation before conviction. To base a policy on “illegal entry” prior to such adjudication cannot be reconciled with a child’s right under the CRC to appropriate legal protection.

The US government exacerbates the issue by claiming an immigration crisis when the statistics reveal diminished numbers of families and unaccompanied children attempting to cross from October 2017 through April 2018 over the same 7-month period in 2016-

2017.²⁰ By casting immigrants and refugees as *illegals* and repeating the term in the context of a purported tsunami of illegal crossings, the government, media, and public remove from the policy debate the ethical foundation of US law, the CRC, and the rule of law.²¹ The ethical challenges mount when the new policies result in criminal proceedings in which parents often have mass (more than 50 persons) criminal hearings and often plead guilty without knowing their legal rights or remedies.²² If parents then choose to continue with the asylum procedures, they face lengthy separation from their children or will be forced to endure detention as a family, further restricting their rights. For children especially, the absence of legal representation exacerbates their losses. An increasing number of children, some as young as 3 years old, are appearing in court without family or an attorney.²³ The Office of the United Nations (UN) High Commissioner for Refugees criticized such procedures more than 10 years ago and declared that “government authorities will need to investigate and make a determination on refugee status before seeking to prosecute or penalize asylum-seekers for their unlawful entry or presence.”²⁴

Failure to follow the CRC exacerbates childhood trauma. Refugees fleeing persecution and violence often arrive with posttraumatic stress disorder (PTSD) and physical and mental wounds from the stress of life in exile, which US policies exacerbate. The UN states that detention of child refugees “always constitutes a child rights violation.”²⁵ The CRC recognizes the special needs of children that are denied under US policies of separation, criminalization, detention, and deportation. The cumulative effect of these policies, especially on children, raises ethical questions of how medical staff respond to and avoid aggravating children’s stress, especially in private detention centers. These centers, often private for-profit corporations, have long records of inferior medical care, abuse, and neglect, all in contravention of the CRC’s call for special care for children.²⁶

Children in detention have significant health concerns, and some even die.²⁷⁻²⁹ In a 2018 federal case, one “psychiatrist testified that the government’s forcible separation of children from their parents had caused them to suffer PTSD and put them at risk of grave short- and long-term physical and mental health consequences.”³⁰ The judge ordered the children reunited with their family but acknowledged that the harm was “likely to continue even after family reunification.”³⁰ One federal court found that the policy of family separation and the manner in which it was implemented was likely to be—citing an earlier case³¹—“so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”³² Another federal judge held the separation “arbitrary and conscience shocking” and “causing irreparable harm.”³³ Underscoring the harm, some children did not recognize their parents when reunited.³⁴

Weaponizing children in defending the border. US officials unabashedly name family separation “a tough deterrent” by using children as weapons to defend the nation’s border in contravention to the goals of the CRC.³⁵ Furthermore, the Department of Justice instructs immigration judges and asylum officers to avoid considering the best

interests of the child in immigration decisions.³⁶ Former Congresswoman Elizabeth Holtzman, a coauthor of the 1980 Refugee Act, poses the ethical challenge to each of us: "DHS [Department of Homeland Security] has been transformed into an agency that is making war on immigrants and refugees."^{37,38} Holtzman concluded:

The final straw has been the separation of children from their parents at the Southwest border. This is child kidnapping, plain and simple. Seizing children from their parents in violation of the constitutional rights of both is bad enough ... but doing so without creating proper records to enable family reunification shows utter depravity on the part of the government officials involved.³⁷

Abdication of legal and moral leadership in protecting children. The CRC calls for universal recognition of children's human dignity. The United States' failure to ratify the CRC and its current detention policies will encourage nations with less dedication to the rule of law or less robust medical establishments to ignore the CRC's promise to protect children and their families. In the Cold War hysteria over national security fears, detention of an alleged Cold War spy led Justice Robert Jackson, a former prosecutor in the Nuremberg trials, to challenge the claim that the alleged spy posed a security threat: "Since we proclaimed him a Samson who might pull down the pillars of our temple, we should not be surprised if peoples less prosperous, less strongly established, and less stable feared to take him off our timorous hands."³⁹ We hold out our Republic and our Constitution as exemplars of the rule of law, yet we succumb to fear based on a purported border crisis and pejorative appellations for refugees while seeking to hide the problem in detention centers. Balancing the requirement not to return refugees to persecution with the duty to protect the border will always raise significant constitutional, legal, and ethical challenges. Even when upholding the Executive Travel Ban case, Justice Anthony Kennedy warned that we must recognize our leadership role in protecting rights, stating, "An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."⁴⁰

Duties of Professionals

Finally, the CRC suggests that medical and legal professionals have a duty to hold our government accountable to appropriate care of children. The CRC, as part of international law, establishes an affirmative duty to protect rights. When governments fail to protect such rights, its citizens should call them to account. The American Medical Association⁴¹ and the American Bar Association⁴² have spoken out against separating children from their families. Still, the vast chasm between the CRC's international standards and current federal policies raises ethical issues for all members of the body politic. Should immigration judges and government attorneys participate in asylum adjudications if a child appears without family or a legal representative? What role should medical professionals play when contracted private detention centers become places of sexual abuse, inferior medical care, and poor nutrition?⁴³ What more can professional associations do to hold those accountable who provide such minimal care?

Conclusion

"We, the people, in order to establish a more perfect Union,"⁴⁴ have enabled government to implement these policies. We have succumbed to the false rhetoric of an invasion of illegal immigrants and refused safe haven to those fleeing violence, causing irreparable harm. The ethical foundation of the CRC calls on each of us to understand how far our government has strayed from what was once called the "US child rights treaty."⁷ The world community sought, through the CRC, to enable children to live and flourish with dignity. Given the medical and psychological harm children face through family separation, detention, and deportation, our refusal to abide by the CRC's principles denigrates our values of equality and freedom while teaching the world the wrong lesson.

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Craig B. Mousin, JD, MDiv has been the University Ombudsperson at DePaul University in Chicago, Illinois, since 2001. He joined DePaul’s College of Law faculty in 1990, where he teaches asylum and refugee law. He also co-founded DePaul College of Law’s Asylum and Immigration Legal Clinic and its technical assistance program. He received his BS from Johns Hopkins University, his JD from the University of Illinois at Urbana-Champaign, and his MDiv from Chicago Theological Seminary.

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